No. 4113.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
WALTER V. EMPIE,
Doing Business as Willis Allen Motor Co., Bankrupt.

H. W. Swender,
Appellant,
vs.
Walter V. Empie,
Appellee.

BRIEF OF APPELLEE.

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STATEMENT OF THE CASE.

The appellant begins his opening brief by argument and makes no statement of the case.

This is an appeal from an order of the United States District Court for the Southern District of California, Southern Division, made on June 13, 1923, granting a discharge in bankruptcy to Walter V. Empie, an adjudged bankrupt. [Tr. p. 2.] The appeal is upon the sole ground that court erred in granting said order of

discharge, over the objections of appellant, that the said bankrupt had made a false oath in the bankruptcy proceedings. [Tr. p. 7.]

The said Walter V. Empie was adjudged a bankrupt by the said court on May 20, 1922. [Tr. p. 6.]

On July 6, 1922, at the first meeting of the creditors, the said bankrupt was interrogated with reference to the sale of a piano and phonograph, and he testified that in 1920 he owned a Packard Grand Piano and a Victrola, and sold the piano for $850.00 and the phonograph for about $300.00; that he had a hazy remembrance of the transaction; that he did not recall the details of the transaction, but if given an opportunity would look it up and give full information at the next meeting (he repeated this latter statement for at least sixteen times during the examination); that he did not recall the name of the party to whom sold; that he believed that he received a check or paper of some kind; that it was not in currency, and must have been a check; that he did not remember whereabouts in Los Angeles the sale took place; that the sale was in the fall of 1920, but was not sure it was not in 1921; that, as he remembered, the purchaser came to his house with a truck and took the instruments away; that he did not recall the storage company that moved them away; that he had been in partnership with Willis Allen, a brother of the attorney herein, in the Willis Allen Motor Company, and the partnership went on until he filed suit for dissolution of the partnership and an accounting; that the sale was

not made in contemplation of bankruptcy; that the transfer of the piano and phonograph was not to a person that he owed money or to a personal friend or relative or business associate; that it was not a pledge or security for money; that he didn't have any claim on the piano or phonograph or anything giving him a right to redeem; that he didn't remember how he happened to get this purchaser, that the party was an absolute stranger,—that he did not recall the incident; that the proceeds received went into his general funds; that he didn't remember what bank he deposited them in; and was trying to explain when interrupted; and that the sale was for a fair value. [Tr. pp. 9 to 25 inc.]

On November 17, 1922, further testimony was taken, and D. J. Cuthbert, a representative of the Southern California Music Company, testified that in June, 1921, the bankrupt executed bills of sale of the piano and phonograph to the company but no money was paid and they stood as a credit until September 8, 1921, when due bills for the same were issued to one Vernon H. Martin. The said Vernon H. Martin testified that he was a brother-in-law of the bankrupt and received the said due bills from the bankrupt in September of 1921, in payment of a debt that the bankrupt had owed him since June, 1919; that he returned the due bills to the bankrupt and asked him to sell them for him; that these due bills were only good for one particular musical instrument each; that the bankrupt sold his (Martin's) $850.00 due bill for a piano, to a man

named Miles, and that he received the contract with Miles by mail and he signed and returned it; that the bankrupt could not sell the $312.00 due bill (for the phonograph) and returned it, and he (Martin) still had it. The said Leroy W. Miles testified that he met the bankrupt on a street car and was telling the bankrupt about being dissatisfied with a piano that he had purchased, when the bankrupt told him that he knew where he could get a due bill that would save him some money; that subsequently he went to see the bankrupt and arranged a contract; (contract between Vernon H. Martin and Leroy W. Miles here introduced in evidence); that he was making monthly payments on the contract with Martin; that the bankrupt told him that the due bill belonged to Martin; that he purchased the due bill on August 11, 1922; and that he signed a bill of sale from the Music Company to Martin at the time the piano was delivered.. (The bankrupt offered and attempted to explain this transaction but was not permitted to do so.) [Tr. pp. 26 to 30 inc.]

On December 2, 1922, the appellant, H. W. Swender, a law partner of counsel for appellant, filed specifications of objections as a creditor to the discharge of the said bankrupt on the grounds, (1) of having made a false oath in relation to his proceedings in bankruptcy, (2) of having concealed property, and (3) of having failed to keep books of account. [Tr. pp. 6 and 7.]

On February 16, 1923, the said bankrupt testified at the hearing of the Creditors' Specifications of Objec-

tions to Discharge of the bankrupt, regarding the sale of the piano and victrola; that in June, 1921, he contemplated returning to Texas and decided to dispose of the piano and victrola and advertised them and asked the Southern California Music Company to assist him in selling them, and signed a bill of sale to them so that they could do so; that he believed, and was sure, that he was out of town at the time the deal was actually closed, but he understood that a truck called at his home and took the piano and victrola to the purchaser; that he thought he knew the name of the purchaser at the time but did not then recall it; that the due bills were then sent to him through the mail; that he didn't know whose truck called for the piano and victrola; that he didn't remember the date, thought the dates in the record, of June 1st and June 3rd, 1921, were correct, but was not positive; *that it was at least a year before he filed his petition,* on May 19, 1922; that the due bills were not transferable, and one read for a Grand Piano and the other for one Victrola; that at that time he owed his brother-in-law, Martin, $500.00, and Martin wrote him,—as he remembered it,—in August, 1921, that he wanted the money; that he asked the said Martin if he was willing to accept the due bills, as it was not convenient to pay the money then; and he agreed to accept them; that as the due bills were not transferable, he went to the Music Company—if he remembered right,—about the 12th of September, 1921—and had them issue new due bills to Martin, and he sent them to him; that Martin returned the due bills to said bankrupt right away

and asked him to dispose of them, as he, Martin, could not do anything with them in Illinois; that he did not dispose of them until he sold them to Miles,—which, as well as he remembered—was about August 11, 1922; that he had the two due bills, that is, Martin's due bills, at the time he testified in the bankruptcy proceedings on July 6, 1922; that he didn't remember exactly when he received the due bills issued to him by the Music Company (the first set of due bills issued), but his remembrance was that he signed a release or bill of sale, or whatever it was called so that they could go ahead and sell for him, and a little later on he found out, while he was out of the city, they were sold to a stranger—he thought he heard the name at the time but didn't remember it—and while out of the city they had the piano and victrola taken from his house to some other place, he thought to the house of the purchaser, and shortly after he received the due bills through the mail, he didn't remember the exact date, but thought it was early in 1921. [Tr. pp. 33 to 42 inc.]

On March 16, 1923, the referee filed his report to the effect that none of the objections to the discharge had been sustained, and recommended the discharge of the bankrupt. [Tr. p. 42.]

The findings of the referee in reference to charge of false oath was considered in connection with the charge of "concealment of property," and the charge of "concealment" was the first in order in their joint consideration.

The referee in setting forth the matters to be considered stated that as the proceedings were quasi-criminal, the proof should be "clear and convincing" that he *knowingly and fraudulently* intended to conceal the two musical instruments, and that they were in reality his own property, and particularly that in order to carry out and consummate such concealment, he with a memory of the transactions in which he exchanged the musical instruments for the due bills, testified and made a false oath that he had sold them, being at the time his own property, practically for cash down to a stranger.

The referee, in referring to the manner in which the examination of the bankrupt was conducted, stated that there was much animosity displayed by counsel in the examination; that one Willis Allen, a brother of one of the counsel for the objecting creditor (who was a former partner of this counsel) and the son of another of such counsel had been engaged in partnership with the bankrupt, wherein it appeared that the said counsel was also interested; that the bankrupt put up $10,000.00 in the business against the experience of the said Willis Allen, and the partnership had resulted in disagreements and litigation in which much animosity had been engendered, with the result that frequently during the examination, both in the bankruptcy proceedings and the hearing of the objections, the atmosphere of the court room vibrated with the enmity and antagonism which the parties concerned felt for each other.

The referee, in referring to the manner in which the bankrupt testified, stated that the bankrupt did in the first instance testify that he sold the piano and phonograph for cash or for check to a stranger and that they were his property, and later corrected this testimony and testified that he had exchanged them for due bills, which he had long before his bankruptcy used in payment of a debt to his brother-in-law, one Vernon H. Martin; that he testified under persistent pressure, and persistently requested time and opportunity to look up the details of the transaction; that it would seem that he should have remembered more promptly and clearly the circumstances relating to his disposition of the piano and phonograph, unless he was confused, frightened or suffering at the time from some abnormal loss of memory; that he did not appear frightened or confused, but did not seem to realize the responsibility cast upon him as a petitioner in bankruptcy proceedings or the importance of the truth concerning the transaction relating to the musical instruments and did not seem embarrassed or troubled at all by a conflict or inconsistency in his testimony; that he seemed a frank, candid and willing witness, *but his memory, until refreshed, seemed almost uniformly bad;* that his memory when elicited in response to direct questions was abnormally bad, and yet his reactions in response to questions tending in their nature to be leading was extremely candid; and that the general impression made upon the referee as to the bankrupt's attitude in respect to matters concerning which he was

interrogated and in respect to his willingness to testify was favorable.

The referee then found that, from the testimony taken both in the bankruptcy proceedings proper and also on the hearing of the objections to the discharge, the bankrupt had not committed an offense punishable by imprisonment as provided in the bankrupt act; that at the time of bankruptcy and at the time of the bankrupt's testimony, the due bills or their proceeds belonged to Martin; that under such proof the bankrupt had neither *knowingly* nor *fraudulently* concealed while a bankrupt any of the property belonging to his estate in bankruptcy, nor had he *knowingly and fraudulently* made a false oath or account in or in relation to this or any other proceeding in bankruptcy; and that in respect to the specific objection charging him with having knowingly and fraudulently concealed while a bankrupt from his trustee the said piano, phonograph and due bills and of having knowingly and fraudulently made a false oath or account in respect to them, he was entitled to his discharge and the same should be granted.

The referee then found that the transfer of the due bills to Martin by the bankrupt was in good faith.

The referee also found that with respect to the charge of having made a false oath, that he was not fully convinced that the bankrupt even at the time of his first examination remembered the details of the transaction relating to the musical instruments and the due bills given in exchange therefor, and knowingly made a false oath.

And lastly, the referee, after stating that the proof should be clear that the alleged false oath was not only knowingly made, but also that it was fraudulently made, he made his finding that even if a finding could be sustained that the bankrupt in the first part of his examination knowingly gave false testimony and made a false oath, there was no evidence to support or sustain a further finding that he *fraudulently* made a false oath, no creditor or any party interested in the estate had been, through his testimony deprived of any dividends or of any interest in or right, as a creditor or otherwise, to the said piano, phonograph and due bills; and *that the bankrupt should be discharged.*

On June 13, 1923, the said court ordered a discharge of the bankrupt and the Honorable District Judge thereof rendered an opinion in which he stated, that after a careful reading of the various transcripts having to do with the matters involved in the objections to the discharge of the bankrupt, he was constrained to affirm the findings of the referee and order the discharge; that there was nothing in the evidence to justify the conclusion that the referee was wrong in holding that the bankrupt had not "knowingly and fraudulently" made a false oath. [Tr. p. 49.]

On June 25, 1923, a motion for a rehearing was denied. [Tr. p. 50.]

On June 25, 1923, the appellant filed specifications of error, to the following effect: (1). [Tr. pp. 2 to 5.]

This appeal is based solely upon the ground that the bankrupt made a false oath. [Tr. p. 7.]

ARGUMENT.

The appellant in his brief has made his argument under six alleged errors of the referee, and we will endeavor to follow the same chronological order, after first discussing two additional matters, viz: (1) the effect of the lack of specifications of error, and (2) the nature of the appeal, in the sense of whether this is an appeal from the order of the court or from the findings of the referee.

The argument, therefore, will be grouped under the following heads: (1) absence of specifications of error; (2) the nature of the appeal; (3) the falsity and materiality of the testimony of the bankrupt; (4) the quantum of proof requisite to the denial of a discharge; (5) knowledge of falsity on the part of the bankrupt; (6) fraudulent intent of the bankrupt; (7) failure of the bankrupt to realize importance of the testimony; (8) the effect of correction of testimony by bankrupt; and (9) the presumptions accorded the findings of the referee and the order of the court on appeal.

I.

Absence of Specifications of Error.

The appellant in his brief failed to incorporate therein his specifications of error.

> "If a brief contains no specification of the errors relied upon, the court may refuse to consider it and may affirm the judgment, or dismiss the appeal."
>
> 3 C. J. 1414;
>
> Rule 24 U. S. Circuit Court of Appeals, Ninth Circuit.

Considering the flagrant violation of this well known and long standing requirement, we insist that the order discharging the bankrupt be affirmed and the appeal be dismissed.

The appellant in lines 9 to 10 on page 4 of appellant's brief in referring to the bankrupt's return of due bills to the Music Company, states that it was "when several suits were pending against him in which judgments were subsequently rendered against him and which judgments the bankrupt listed as liabilities in his schedules."

Also, in lines 12 to 14 on page 34 of appellant's brief, it is stated that the bankrupt is "a university graduate; has been admitted to the practice of law in this state; and is employed as a clerk in one of the local courts."

These statements, nor either of them, were matters referred to in the specifications of error, nor were they a part of the record. They have no place in the brief; and we are confident that, pursuant to the usual practice of courts, these highly unfair and improper references will be disregarded; especially in view of the fact "that evidence as to the matters concerning these suits was excluded only because of appellant's objections. [See Tr. p. 22.]

Statements not sustained by the record are improper and will be disregarded by an appellate court, and such practice is condemned by courts.

Stevens v. Haile (Tex.), 162 S. W. 1025.

The appellant (appellant's brief, p. 16), also attempts by insinuations to attack the sale by the appellee to his brother-in-law of the due bills in question. This matter is expressly excluded from the appeal by the agreed statement of facts. [Tr. pp...] The purpose of its inclusion is obvious.

II.

Nature of Appeal.

The appellant in his brief discusses the appeal on the sole ground of errors in the findings of the referee; the order of the court discharging the bankrupt is disregarded altogether.

The report of the referee consists of: (1) A statement of the issues involved, and the requisite quantum of proof; (2) a statement of the manner in which the examination was conducted; (3) a statement of the conduct and demeanor of the bankrupt while testifying; (4) a statement of the evidence,—which has not been controverted; and (5) the deductions and conclusion of the referee from the evidence, and his *recommendation* of discharge.

While we believe and strenuously contend that each and every one of the opinions expressed and the conclusions reached by the referee are true and correct, and in accord with the evidence, we do not understand, however, that it is necessary that these findings be invulnerable to attack, in order that the order of the court discharging the bankrupt be affirmed.

As we view it, the question is whether or not the order of discharge was justified, irrespective of statements contained in the findings of the referee or the manner in which his recommendation was reached. The order was made by the court after reading all the transcripts in the case; and error must be predicated on the order not the findings. Therefore, it is apparent that the appellant has mistaken his remedy.

In a similar situation it has been said:

> "The appellate court reviews the action of the court on the report of a master in chancery in equity causes, and not the action of the master *per se*. Therefore, the third assignment of error, that 'the master erred in the report which he made to the court, filed April 4, 1907,' cannot be considered."
>
> Braxton v. Liddon, 55 Fla. 785, 46 So. 324, 325.

III.

Falsity and Materiality of Testimony.

Alleged First Error of Referee.

The appellant under this head (appellant's brief, pp. 5-18), takes three (3) partial and unconnected statements in the findings of the referee and labors to show, by strained construction and perversion of obvious meaning, that the referee erred in "holding that the offense of 'false oath' * * * can only be committed where a bankrupt testified intentionally concerning property which rightfully should belong to the bankrupt's estate and which should be apportioned

in dividends to his creditors." There was no such holding or finding by the referee.

The first statement of the referee relied upon by the appellant (appellant's brief, p. 6), contains the words "that he sold them (the musical instruments), being at the time his own property, practically cash down to a stranger." [Tr. p. 44.] This was a mere recital of the referee as to what the bankrupt did testify to, and the referee stated that it was necessary that it be shown that he testified to this "knowingly and fraudulently."

The second statement of the referee relied upon by the appellant (appellant's brief, pp. 7-8), contains the words, "At the time of the bankruptcy and at the time of Empie's testimony the due bills or their proceeds belonged to Martin." [Tr. p. 47.] The referee was here considering the charge of "concealment" with the charge of "false oath." The quoted words were used in immediate juxtaposition with the word "concealed," and it is plain that they referred specifically and solely to the charge of "concealment;" for later on in the findings, the referee gives additional reasons for not sustaining the charge of "false oath." Furthermore, the referee specifically states that other matters were considered, for he says that from the "transcripts of the testimony taken both in the bankruptcy proceedings proper and also on the hearing of the objections to discharge," the alleged "concealment" and "false oath" was not shown to have been "knowingly and fraudulently" made.

The third statement relied upon by the appellant (appellant's brief, p. 8), contains the words, "No creditor or any party interested in this estate has been, through his testimony deprived of any of dividends or of any interest in or right as a creditor, or otherwise to the said piano, phonograph, or due bills." [Tr. p. 49.] The referee was here considering solely the question whether or not the alleged false oath was "fraudulently made." The question whether or not a false oath could be made as to property that was not a part of the bankrupt estate was not being considered at all. The referee clearly had a right, and was duty bound, to take these matters into consideration in connection with the other evidence in the case, in determining whether or not the alleged "false oath" was made with a fraudulent intent. It is a proposition beyond dispute, that where an alleged "false oath" involves property that could not have been reached by the bankrupt's creditors or property in which his rights are not clear, these matters are entitled to weight in determining whether or not it was made with a fraudulent intent.

See *In re* Hirsh, 96 Fed. 468;
In re Todd, 112 Fed. 315;
In re McCrea, 161 Fed. 246.

The position taken by the referee was, that after considering all the evidence and the nature of the testimony given by the bankrupt and the manner in which given and his inability to remember unless di-

rectly questioned to specific things, the evidence was not sufficiently "clear and convincing" to show that he had "knowingly and fraudulently" made a false oath. The question as to whether or not the right to deny a discharge was confined to a "false oath" as to matters concerning property which should be included in the estate, is not considered or discussed as a legal proposition anywhere in the findings. The cases cited by appellant on this proposition, are, therefore, not in point.

Let it be considered in what respects the testimony of the bankrupt was untrue or false.

The bankrupt testified that he owned a Packard Grand Piano and a Victrola that he bought from the Southern California Music Company, and sold them in 1920 or in 1921, he wasn't sure which [Tr. p. 9]; that he didn't remember the details of the transaction, and requested time to look it up [Tr. p. 10]; that the sale was to a stranger,—that he didn't recall the incident scarcely [Tr. p 12]; that he didn't remember how he happened to get this purchaser [Tr. p. 12]; that as he remembered the purchaser came to the house in his absence from the city and took the musical instruments away; that he believed he received a check or paper of some kind [Tr. p. 13]; that the proceeds of the sale went in with his general funds [Tr. p. 25]; and that he did not remember what bank he deposited the proceeds in, and added, "I was doing business with the Security Trust & Savings and with the Hellman Bank. I don't remember just— (Here

the witness was interrupted by counsel before finishing his answer, and being permitted to explain.) [See Tr. p 25.]

The facts are that the bankrupt in June, 1921, turned the piano and phonograph over to the Music Company on a promise by them to sell the piano and phonograph for him, and executed a bill of sale to expedite matters [Tr. pp. 26 and 36]; subsequently, the piano and phonograph were removed from his home, during his absence, and shortly thereafter the Music Company sent him through the mail two non-transferrable due bills, one calling for a piano and the other for a phonograph, and in the same amount that he paid for them [Tr. p. 26]; in September, 1921, his brother-in-law Martin called on the bankrupt to pay a debt, and he had the due bills changed in favor of Martin and sent them to him, and Martin returned the due bills to the bankrupt and asked him to sell them [Tr. p. 31]; the bankrupt retained the due bills until August, 1922, when an acquaintance on a street car who mentioned being dissatisfied in the purchase of a piano, and the bankrupt told him that he was sure he could get him a due bill that would save him money; and a few days thereafter arranged the transfer of Martin's due bill for the piano to him. [Tr. p. 31.]

Considering the testimony and the facts, it will be observed that the musical instruments were in fact sold to a stranger; the Music Company would not have given a due bill for the same amount as the original

purchase price if there had not been a sale by them when they removed them from his house, and the record is silent as to whom they were actually sold. Regarding the receipt of due bills instead of "a check or paper of some kind," this is not such a great dissimilarity as to show falsity in fact. The appellant attemps to show the bankrupt testified he received "cash" though the testimony shows that the word "cash" [Tr. p. ....] used by the bankrupt was in the form of a question and not an answer—a habit of the bankrupt to repeat questions, appearing all through his examination. The proceeds did in fact go into his general funds, as they liquidated a standing indebtedness. The bankrupt, contrary to the contention of counsel for appellant, never did testify that he deposited the proceeds in bank. While he was trying to recall, he was interrupted by counsel for the appellant, and never did finish the answer. This portion of the answer, therefore, cannot be considered against him. Considering the whole matter, the ultimate result was the same. Counsel for appellant in the examination, avowed that his purpose was to find out who was the purchaser. [Tr. p. 25.] The purchaser was a stranger to the bankrupt, as the evidence shows. Furthermore, the bankrupt was not asked how the transaction was made. The appellant's questions were directed to the sole object of finding out the name of the purchaser. The bankrupt was unable to tell him. The answer of the bankrupt was not false in fact to the specific questions directed to him.

The appellant, however, would have the impression prevail that a discharge must be denied if there be any inaccuracy of detail, either in a literal or a legal sense. Such is not the law.

The alleged false testimony, to warrant the denial of a discharge must be materially false; manifestly false in every sense of the word.

For example, it has been held that where a bankrupt testified that he did not have a bank account at the time of his petition in bankruptcy and that he was not his father's partner and had never had a bank account, it was held that the evidence was insufficient to show the making of a "false oath," where he had never had such account in his own name, although there had been an account in the joint name of himself and his father and mother, and the bankrupt had testified in a previous action that he had paid for an automobile with his own money, which he took from the bank for that purpose.

In re Wilson, 269 Fed. 845.

II.

Proof Warranting Denial of Discharge.

Alleged Second Error of Referee.

The appellant under this head (appellant's brief, p. 19), contends that the referee mistook the proceedings as being quasi-criminal and required a higher degree of proof than was necessary; and that a "preponderance of the evidence" was sufficient to justify the denial of a discharge.

The referee stated that the evidence must be at least "clear and convincing" that the bankrupt knowingly and fraudulently made a false oath. This is the law, whether the proceedings be regarded as being civil or quasi-criminal. A mere preponderance of the evidence is insufficient to warrant the denial of a discharge on the ground of having been guilty of an offense punishable by imprisonment, as provided in the bankrupt act. (*In re* Braus, 243 Fed. 55.)

The great weight of authority is that to warrant the denial of a discharge on the ground of having made a false oath, must be "clear and convincing."

Humphries v. Nalley (U. S. C. C. A. Ga.), 269 Fed. 607;
In re Lally 255 Fed. 358;
In re Taylor, 188 Fed. 479;
In re Hamilton, 133 Fed. 823;

See also

In re Troutman, 251 Fed. 930.

Curiously enough, the rule is thus stated in the only case cited by appellant in this connection, *in re* Lally, 255 Fed. 358, where the court said:

"The evidence must be clear, convincing and satisfactory.'

III.

Knowledge of Falsity.

Alleged Third Error of Referee.

The appellant under this head (appellant's brief, pp. 20-31), attacks the statement and finding of the

referee that he was not fully satisfied or convinced from the evidence that the bankrupt remembered the details of the transaction as to which he was questioned.

Counsel for appellant first contend (appellant's brief, pp. 20-28), that it was shown that the bankrupt testified untruthfully and the burden shifted to him to show that he did not give the untruthful testimony knowingly; and unfairly states, that the referee held that even after the objecting creditor had assumed the burden of establishing and had established the fact that the bankrupt had testified untruthfully in regard to the disposition of certain of his assets, that the burden still remained upon the objecting creditor to show that the bankrupt gave such untruthful testimony knowingly.

The referee made no such holding. The only holding of the referee, was that under all of the evidence he was not convinced or satisfied that the bankrupt had "knowingly" given false testimony as to the transaction.

Furthermore, there was no such burden cast upon the bankrupt. This is not a situation in which a bankrupt makes a positive and unqualified statement as to some fact which is shown to have been absolutely false, and in the nature of things, to give rise to a presumption that he must have wilfully made the statement with full knowledge of its falsity. The bankrupt repeatedly stated that he did not remember the details of the transaction, and again and again, re-

quested an opportunity to refresh his memory. The question is not whether the testimony as to the details of the transaction were or were not true, but is, whether the bankrupt actually did remember them and did not give true testimony as to his recollection. The bankrupt having testified that he did not recollect the details of the transaction, the objecting creditor carried the burden of showing that he did in fact remember them.

Counsel for appellant in an attempt to set up another presumption, didactically state (Appellant's Brief, pp. 28-30) that the bankrupt was presumed by law to remember and fully recollect the details of the transaction; that a witness is presumed by law to fully recollect a transaction as to which he is called upon to testify.

There can be no such presumption. There is no fixed standard of the memory of mankind. The strength of memory varies in different individuals. Moreover, some details make a far less impression than others on the mind of even the same individual. With all, memory is fleeting.

The case of State v. Coyne, 214 Mo. 344, 114 S. W. 8, 21, L. R. A. (N. S.) 993, cited by appellant (Appellant's Brief, p. 30), fails altogether to support the statement of counsel and is far from being in point—that is, for appellant—for the case makes no reference whatsoever to any presumption, either of law or fact, and, furthermore, it is there held that the question as to whether one has testified falsely with knowledge

of such falsity is a question of fact for the jury, and where the defendant has sworn only as to his belief that it is necessary to show that he well knew the contrary of what he swore, and cites Cook's Case, 1 Rob. (Va.) 729, as holding that an indictment for making a false oath in a schedule of debts was subject to demurrer where it did not aver that the debtor well knew and remembered that the omitted debts were justly due and owing.

A search of the authorities is refreshing in the confirmation of the belief that no jurisdiction sanctions the irrational doctrine that appellant would have exist. A contrary doctrine, however, does obtain.

> "The law does not presume that what is once known will always be present in the memory."
>
> Fire Ass'n v. LaGrande, etc., Compress Co. (Tex Civ. App.), 109 S. W. 1134.

The evidence, when considered in its entirety, certainly fails to show that the bankrupt "knowingly" made a false oath. The evidence is far from being "clear and convincing" that false testimony was "knowingly" given.

The examination was had some thirteen months after the sale of the musical instruments. In the meantime, the bankrupt had been engaged in constant controversies, quarrels and litigation in the disastrous business venture with counsel for appellant, their kinsman and the objecting creditor in which he put up $10,000.00 as against "business experience" and lost.

This surely was calculated to make him forget details that otherwise he might remember. Furthermore, the bitter manner in which he was examined and the excessive hostility and constant clashes and bickering of counsel could not have failed to affect him materially. If the examination had been conducted in a proper manner, the bankrupt would obviously have been better able to fix his mind on the questions asked with a result that he would have had a far clearer recollection than he did. Moreover, the witness was constantly asked as to whom the sale was made. The bankrupt was not led by suggestive questioning as to how the sale took place. With the avowed object of counsel that he wanted to find out who purchased the musical instruments, it is not strange that the bankrupt should have centered his efforts on an attempt to recollect who this particular person was. The result is that the bankrupt had in mind the whole time, the person who took the musical instruments from his home. Constantly, the bankrupt testified that he could not then recollect the details of the transaction, and persistently requested an opportunity to refresh his recollection.

The referee's findings were that the atmosphere of the courtroom during the examination vibrated with the enmity and antagonism which the parties felt; that the bankrupt testified under persistent pressure, and persistently requested time and an opportunity to look up the details of the transaction; that the bankrupt seemed a frank, candid and willing witness, but

his memory, until refreshed, seemed almost uniformly bad; that his memory when elicited in response to direct questions was abnormally bad, and yet his reactions to questions tending in their nature to be leading were extremely candid; and that he gave a favorable impression of a willingness to testify as to the matters concerning which he was interrogated.

Manifestly, the evidence fails to show that the bankrupt "knowingly" gave false testimony.

The appellant had the burden of showing not only that the statements of the bankrupt were absolutely and unqualifiedly false, but also that they were made by him with full and complete knowledge at the time, that they were false; that he actually did remember the details and gave false testimony as to his recollection.

In a similar case, where it was charged that a bankrupt had "knowingly and fraudulently" made a false oath in the affidavit as to his petition for discharge and the accompanying schedule of property, by omitting certain shares of stock in a company of which the bankrupt was manager, which were held in his wife's name and claimed to be held for his benefit, and twelve out of the seventy-one shares obtained by the wife were paid for out of the corporate profits, it was held that the evidence was not sufficient to show that he had "knowingly and fraudulently" made a false oath; and the court said:

> "It is obvious that no ground exists, within the statute, unless the proof establishes both ingredients of the offense,—ownership in fact by

the bankrupt of the shares in question, and clear knowledge of such fact on his part, either directly shown or necessarily implied from the circumstances."

Fellows v. Freudenthal, 102 Fed. 731, 733.

IV.

Fraudulent Intent.

Alleged Fourth Error of Referee.

The appellant alleges (Appellant's Brief, pp. 31-33), that the referee was in error in stating that the proof must show that the alleged false oath was not only "knowingly" made, but also "fraudulently" made.

The referee stated the law. The authorities are in accord, that to preclude a discharge on the ground of having made a "false oath," it must appear from the evidence that the alleged "false oath" was not only made "knowingly," but was also made "fraudulently."

See:

In re McCrea, 161 Fed. 246;
In re Hamilton, 133 Fed. 823;
In re Bryant, 103 Fed. 789;
In re Crenshaw, 95 Fed. 632;

And see:

Humphries v. Nally, 269 Fed. 607;
In re Eaton, 110 Fed. 731.

The appellant also complains (Appellant's Brief, p. 31), of the statement of the referee that, "No creditor or any party interested in this estate has been through

his testimony deprived of any dividends or of any interest in or right as a creditor, or otherwise, to the said piano, phonograph, or due bills." [Tr. p. 48.] The contention is, that the referee believed that it was necessary that the false testimony should deprive some creditor of a dividend before it could be said to be "fraudulently made." The referee made no such statement. The referee merely took this as being a circumstance to show the absence of any fraudulent intent. This was proper.

The rule is, that where an alleged "false oath" relates to property which could not have been reached by the creditors or property in which the bankrupt's rights are uncertain, these matters are entitled to weight in determining whether or not it was made with a fraudulent intent.

See:

In re Hirsh, 96 Fed. 468;
In re Todd, 112 Fed. 315;
In re McCrea, 161 Fed. 246.

The appellant contends, however, that it is not necessary that the bankrupt should have made the alleged false oath with any intent to deceive, and cites the cases of:

In re Zoffer, 211 Fed. 936;
In re Sheinberg, 223 Fed. 218;
State v. Waterman (Idaho), 210 Pac. 208;

as sustaining his contention. The cases cited cannot be regarded as authorities for this proposition. The

case of *In re* Zoffer, 211 Fed. 936 makes no reference whatever as to an intent to deceive. The case of *In re* Sheinberg, 223 Fed. 218, involved the question as to the effect a bankrupt's statement to a commercial agency not being relied upon by any creditor, and not to any intent of the bankrupt at the time of giving his testimony. The case of State v. Waterman (Idaho), 210 Pac. 208, lays stress on the effect of the omission of the words "with intent to deceive" in a statute, by holding that the reason that it was not necessary to allege these words was that they were purposely omitted in the statute under consideration.

There can be no question but what there must be an intent to deceive of some character. The very meaning of the word "fraudulently" imports that such must be the case.

> "It implies a deliberately planned purpose and intent to deceive and thereby to gain an unlawful advantage." 27 C. J. 893, citing:
>
> Montreal Bank v. Thayer, 7 Fed. 622, 625.

Accordingly, the rule is, that the false oath must have been made with a fraudulent intent; the word "fraudulently", as used in this connection, meaning with an intent to deceive.

See:

In re McCrea, 161 Fed. 246;
In re Bryant, 104 Fed. 789;
In re Crenshaw, 95 Fed. 632.

For example it has been held that where a bankrupt failed to schedule an interest in the estate of his deceased father, it was not necessarily attributable to a fraudulent intent, so as to justify the refusal of a discharge on the ground of his making a false oath, when by the will of his father the property was left in trust, and the question whether or not the bankrupt had an interest therein which was transferable, was involved, and he, moreover, claimed to have transferred all of his interest in the estate to his wife while solvent.

In re McCrea, 161 Fed. 246.

Accordingly, where a bankrupt omitted from his schedule certain stock which he subsequently included in an amended schedule and offered to surrender to his trustee, and it appeared that the stock was sent by him to an agent for sale some two years before and at that time it was subject to sale for unpaid assessments, and subsequently the bankrupt had become insolvent and all his property had been placed in the hands of a receiver, and pending the bankruptcy proceedings, the bankrupt, in a suit in a state court testified to such facts, and also testified that he had forgotten the stock, not having regarded it of value, and did not know what had been done with it. It was held that, even if the testimony of the bankrupt in the state court was considered, it did not establish the charge of having knowingly and fraudulently made a false oath to the original schedule, there being a failure to show a fraudulent intent.

In re Eaton, 110 Fed. 731.

And, where a bankrupt, more than four months before the commencement of the proceedings, had transferred a stock of goods to his wife, and the bankrupt stated in his schedule that he had no assets of any kind, it was held that such transfer, although it may have been void as to creditors, was valid as to him, and therefore its absence in the schedule was not such a false oath as would forfeit his right to a discharge; and the court said:

> "The oath must have been false in fact. There must have been an intentional wrong in making it. It must have been willful, and for the purpose of concealment and to mislead and defraud his creditors. In the absence of proof of intentional wrong in making the oath, the bankrupt's failing to schedule and deliver up the property for the benefit of his creditors will not bar his discharge, even though the transfer to his wife may have amounted to constructive fraud and have been void as against creditors."
>
> *In re Crenshaw*, 95 Fed. 632, 633.

The findings of the referee are, that the bankrupt seemed a frank, candid and willing witness; that his reactions in response to questions tending in their nature to be leading was extremely candid; and that he gave a favorable impression of a willingness to testify as to the matters concerning which he was interrogated.

Furthermore, both the findings and the transcripts show that he repeatedly requested an opportunity to refresh his memory, and again and again offered to

look the matter up and give full information. [Tr. pp. 9 to 25.] Moreover, he offered to explain the whole transaction at the first succeeding proceedings, but was denied the privilege. [Tr. p. 10.] In addition, the transaction as to which he testified had transpired long before his bankruptcy and concerned property that was not a part of the estate, so there could have been no motive in giving false testimony. Considering every circumstance, it is at once manifest that there was no showing of a fraudulent intent.

V.

Failure to Realize Importance or Materiality of Proceedings.

Alleged Fifth Error of Referee.

This appellant under this head (Appellant's Brief, pp. 33-34), contends that it was error for the referee to recommend the discharge of the bankrupt, after stating in his findings that the bankrupt seemed not to realize or appreciate the solemnity of the proceedings or the importance of the truth concerning the transactions or his responsibility as a petitioner in bankruptcy, and did not seem to be troubled or embarrassed by a conflict or inconsistency in his testimony.

This does not constitute a finding, and the only importance to be attached to it, is that it seemed to negative any wrongful intent or fraudulent purpose on the part of the bankrupt. Unless the referee was satisfied from the entire evidence that the alleged false

statements were both knowingly and fraudulently made, it was his duty to recommend the discharge.

VI.

Effect of Correction of Testimony.

Alleged Sixth Error of Referee.

The appellant, under this head (Appellant's Brief, pp. 35-36), refers to the statement of the referee, that the bankrupt after testifying that he sold the piano and phonograph for cash or for check to a stranger and later corrected this testimony and testified that he exchanged them for due bills which had been used long before bankruptcy in payment of a debt, and complains that this influenced the referee in refusing to sustain the charges. There is no intimation in the finding that it did. However, contrary to the contention of appellant, the law recognizes the right to refuse to deny a discharge where the bankrupt corrects his testimony as to errors in statements previously made.

See:

In re Doyle, 199 Fed. 247.

Thus it has been held that a bankrupt's discharge would not be denied on the ground that he made a false oath, that he did not in a certain year transfer any property to his wife, where it appeared that before the completion of his examination he explained that he had testified inadvertently and mistakenly regard-

ing such transfer, and that it had not been his intention to testify falsely.

In re Doyle, 199 Fed. 247.

The Marcus case cited by appellant certainly cannot be said to establish appellant's proposition that erroneous testimony cannot be corrected so as to obviate the denial of a discharge. The court in this case merely expressed his personal opinion as to the weight of evidence given to correct testimony, but he did not state as a matter of law that such testimony is not available to preclude the bankrupt from being denied a discharge, for the bankrupt in that case was given a discharge, and the court said:

> It is nevertheless open to the bankrupt to show from his whole testimony whether his testimony, if actually false, was not intended to mislead upon a material point."

In re Marcus, 192 Fed. 743.

To same effect:

In re Eaton, 110 Fed.

VII.

Presumptions on Appeal.

The findings of the referee in this case were approved by the court; furthermore, the court also reviewed the transcripts of evidence. *Prima facie,* therefore, the order is correct, and under the well recognized presumptions that obtain, should be affirmed.

The rule is well settled, that the findings of a referee affirmed by trial judge will not be set aside on

appeal on anything less than a demonstration of plain mistake, and that justice requires a different conclusion.

Fallows v. Continental etc. Trust etc. Bank, 235 U. S. 300, 35 Sup. Ct. Rep. 29, 59 L. Ed. 238;

Dupree v. Watson, 216 Fed. 483;

In re Tunpin Hotel Co., 248 Fed. 25;

Canner v. Webster Tapper Co., 168 Fed. 519;

In re Sweeney, 168 Fed. 612;

In re Dorr, 196 Fed. 292.

"The reversing court will hesitate especially to overturn the referee's finding of fact; for the referee is in a better position to judge of the testimony, since he heard it given, and noted the demeanor of the witnesses, and was in a position where he could feel the weight of the spoken words. Only manifest error will justify a reversal of the facts."

3 Remington Bankruptcy, Sec. 2861.

Conclusion.

Counsel for appellant in closing (Appellant's Brief, pp. 38-39), set forth pretended reasons for this appeal. We feel sure that this court will ignore such improper statements.

The position that we take is (1), that the answers of the appellee to the questions as propounded and in connection with the avowal of the purpose of counsel, were not false in fact; (2) that the evidence was

not "clear, convincing and satisfactory" that the appellee "knowingly" made a false oath; and (3) that the evidence failed to show that the alleged untruthful testimony was given with a "fraudulent intent."

We most earnestly urge that the order of discharge be affirmed.

Respectfully submitted,

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